

Polish Courts are Our Courts

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Maximilian Steinbeis Sa 15 Jul 2017

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Dear Friends of Verfassungsblog,

Recep Tayyip Erdoğan is apparently still angry about the German comedian Jan Böhmermann and his notorious *Schmähgedicht* (poem of revilement). Last February, he managed to get the [District Court of Hamburg](#) to ban large parts of Böhmermann's obscenity-laden jibe, but that did not suffice to placate the President's wrath: He wants to have *all* parts of the text forbidden, and he is now [pursuing this claim before the Court of Appeals](#). The Hamburg courts are notorious in their own way, given their exceptionally stern view on freedom of speech and privacy infringements, but the ultimate outcome of the lawsuit remains to be seen – and when push comes to shove, there is still the Federal Constitutional Court. In any case, these are all clearly independent judges, who are not beholden to Erdoğan or anyone else in power.

If Böhmermann had to face a Turkish court, he could not be so sure of his judges' independence. Luckily for him, Turkey is not an EU Member State. For if it were, Erdoğan could, according to EU civil procedure law, seek injunctive relief – and maybe also damages and smart money and whatnot – from the jurisdiction of the country of his "center of interest". Which would be Turkey. And any findings by the court in Ankara would in principle have to be recognized and executed by German law officials. Erdoğan might even have unleashed his criminal prosecutors on the hapless comedian; in Turkey you seem to go to prison for way less nowadays. With an EU arrest warrant, Germany might be requested to surrender him to stand to justice in Turkey.

Turkey is not an EU member, so far. But Poland is. Maybe Mr. Böhmermann one day feels like trying his satirical talent at the expense of Jarosław Kaczyński? He should think twice.

Kaczyński's party has proposed a new draft law on judicial reform this week, which provides that all judges of the Supreme Court will be retired from the date of its entry into force, with the exception of those that the PiS Minister of Justice and Attorney General Zbigniew Ziobro considers suitable for the further exercise of their office. Another law has already been passed by the Parliament, which hands control over the National Council of Justice, where the careers of the judges in the country are decided, to the majority in Parliament. The constitutional court is already firmly in the hands of PiS. If this is how the future of the Polish judiciary looks, then it might be soon correct to say: If you want to have a career as a judge in Poland, you would rather pay heed to Kaczyński's wishes.

My point is: Judicial independence may sound like a technical, unsexy, lawyerly matter – nothing a normal citizen would care about as passionately as she would e.g. about freedom of speech or discrimination. That is wrong, of course: It does not take a lot of reflection to realize that the most beautiful freedom of speech and anti-discrimination laws are of little help without independent courts to enforce them. You still might feel tempted, though, to consider the loss of judicial independence in Poland to be basically a problem of the Poles.

That is why I brought up the thought experiment about Böhmermann and Erdoğan. If judicial independence goes down the drain in Poland, freedom of speech in public television in Germany may suffer. This is how the European Union works.

If the judiciary in Poland stops being independent, that is by no means just a problem of the Poles. It potentially affects all of us in the EU. This is why the EU institutions have no reason to shy away from reminding Poland of its obligations under Article 2 TEU. Commitment to the rule of law is not just a matter of fluffy common values we vaguely expect members to adhere to if they want to culturally fit in with us. It is as hard an operating condition of European integration as can be. The European Union is not just some treaty of international law concluded by states of all constitutional colours for their own benefit. It is a legal community. If the legal system in a Member State is broken, the legal system in the whole of the EU is broken. The EU Commission owes it to me and to you and to all of us to not let it come to that.

Inspired Courts

Five former presidents of the Polish Constitutional Tribunal have written a protest note on the subjugation of the judiciary in their country, an [English version of which we published here](#) – a reform which, in the eyes of five of the most distinguished lawyers in the country (and probably many others), may "permanently destroy the Republic's position of a State under the rule of law". [Details](#) of these plans are explored by MAGDALENA OKONSKA (in German). We hope to post a more in-depth comment on this disturbing development by MARCIN MATCZAK in the next days.

In Germany, the event of the week was the Federal Constitutional Court's judgment on freedom of association: the Grand Coalition had adopted a law to restrict collective labour agreements by small unions representing special, particularly powerful groups in the workforce, like airplane pilots or train drivers. A thorough analysis of this decision is delivered by FLORIAN RÖDL and ANDREAS LEIBINGER (in German).

The constitutional debate on same-sex marriage in Germany has not lost momentum this week: MATHIAS HONG has, after Uwe Volkmann, posted a [follow-up to his intervention from the previous week, responding to his critics](#) (in German). In the case of a review before the Constitutional Court, DANIEL TODA CASTÁN explains what the Karlsruhe Justices might find useful in terms of inspiration by the [jurisprudence of other constitutional courts, especially the Spanish](#).

In Russia, marriage for same-sex couples seems utterly out of reach – instead, "gay propaganda" is forbidden by law. The recent [judgment of the Strasbourg Human Rights Court on this law is analyzed](#) by SERGEJ PROKOPKIN (in German) who points to another pending lawsuit in Strasbourg against the refusal of marriage for all.

The right to family reunion is at the core of the recent agreements between Greece and Germany about refugee protection. Those who land in Greece, but have family members in Germany, are often entitled to an asylum procedure in Germany under the Dublin III agreement, which Germany strives to make more difficult. [How that works and if that is lawful is examined](#) by VINZENT VOGT (in German).

At the G20 summit in Hamburg, 32 journalists had their press accreditation withdrawn because of unspecified "security concerns". Up to now, it is unknown what exactly was going on, and we may never know. But we do know, with help from EIKE MICHAEL FRENZEL (in German), that the subtle [administration and regulation of journalistic access to big-time political events is not exactly conducive to the flourishing of a free press](#).

Elsewhere

VALÉRIE VON SUHR and DANA VALENTINER [add some valuable arguments to the same-sex marriage debate](#) in Germany (an argumentative overview of the dispute can be found [here](#), both in German).

CHRISTIAN ERNST, as a consequence of the G20 debacle, calls for "[neutral and objective assembly observers](#)".

TOM GERALD DALY looks for criteria that can be used to distinguish mere political problems from "[democratic decay](#)" below the threshold of a breakdown of democracy.

PIETER CANOOT and CLAIRE POPPELWELL-SCEVAK analyze the ECtHR judgment on the Russian "[gay propaganda](#)" law, and LAURENS LAVRYSEN looks more closely at the "[outrageously homophobic](#)" dissent by the Russian judge Dmitry Dedov.

JAKOB CORNIDES is [appalled by the "euthanasia" judgment of the ECHR in the case of the baby Charlie Gard](#), whose life-sustaining treatment is to be interrupted at the request of the doctors and against the resistance of the parents.

LUCY MOXHAM reports on the [growing trend to disregard judgments of the Strasbourg Court](#).

Next week, on Tuesday July 18th we will livestream an exciting debate at the FU Berlin on „ [Human Rights Law in](#)

[Crisis](#)“ featuring Arnd Bauernkämper, Tomer Broude, Anne Peters and Helmut Aust. Stay tuned!

All the best,

Max Steinbeis

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